RIGHTS STUFF

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Evidence Necessary to Win Discrimination Complaint

Very often, people call the BHRC and want to file a discrimination complaint. They say they are a member of a minority group and they have been mistreated in some way. They feel, quite strongly, that their mistreatment is related to their membership in a minority group. While we never disrespect feelings, we have to tell them that more is required to win a case. You have to have evidence that shows the mistreatment is related to your minority status. A recent case illustrates this point well.

Steven Turner was hired by Humana Pharmacy in December, 2008, to be an inventory control manager. His wife, Jane Turner, has Type I diabetes and heart disease, something several people at Humana were aware of.

In May, 2009, Turner told his supervisor, Dan Brais, that he needed to take a couple of days off work because his wife needed to have a medical procedure.

In June, Brais placed Turner on a "competency and contribution improvement plan." Brais said that Turner had missed deadlines, had not communicated to his supervisors why he was missing deadlines, had not drafted job responsibilities for his staff as required and had not enrolled in classes for leadership training development. The improvement plan said that if Turner's work performance did not improve immediately, he could be terminated.

In July, Turner told Brais that he needed to miss a meeting because he had to take his wife to a medical appointment.

In August, after several meetings regarding Turner's job performance and his failure to improve, Brais terminated him.

In April, 2011, The Turners sued Humana, saying that the company had discriminated against him because he associated with a person with a disability (Mrs. Turner) in violation of the Americans with Disabilities Act. They lost.

The Turners claimed that a jury could reasonably find that Humana fired Mr. Turner because Mrs. Turner's medical expenses were high. But they did not provide any evidence that her medical expenses were in fact high. The Court of Appeals said that the jury could not make a finding based on speculation and guesses but only "on the basis of actual evidence."

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BHRC
PO BOX 100
Bloomington IN
47402
349.3429
human.rights@
bloomington.in.gov

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The Turners claimed that Humana replaced Mr. Turner with someone "whose health care would [not] be extraordinarily expensive." But again, they provided no evidence that his replacement had no dependents with high medical expenses.

The Turners argued that since several Humana employees knew specifics about Mrs. Turner's medical condition, that knowledge should be imputed to Brais, the man who terminated Mr. Turner. But Brais testified that he did not know Mrs. Turner's specific diagnosis, her prescribed treatment or her health care costs, and the Turners provided no evidence to refute his testimony.

The Turners also argued that Humana terminated Turner because it feared that Turner might be distracted from his work because of his wife's condition. But again, they had no evidence to support this theory. The Court said that it is possible that "a jury" could reach this conclusion, "but, without more, it's not possible that a *reasonable* jury could."

Turner acknowledged that Humana's improvement plan was based on facts - he had missed deadlines and failed to take required training. He argued, however, that Humana's deadlines and other job requirements were unreasonable. The Court said that "it is not for the jury to decide whether the deadlines imposed by the employer and missed by an employee were reasonable or whether the tasks assigned the employee were important - those are clearly business judgment calls to be made by the employer."

The Court said that Humana had provided evidence showing that it terminated Turner because he failed to improve his work performance after being warned and counseled repeatedly over the course of months.

The case is Turner v. Humana, Inc., 2012 WL 4506297 (S.D. Ohio 2012). If you have questions about fair employment laws, please contact the BHRC.

EEOC Settles Pregnancy Discrimination Complaint

A woman worked for Comfort Inn & Suites in Taylor, Michigan, as a housekeeper. She said that when she let management know she was pregnant, they told her she could not continue to do her job because of the potential harm to the development of her baby. She filed a complaint with the U.S. Equal Employment Opportunity Commission, which recently negotiated a settlement on her behalf.

The Pregnancy Discrimination Act, a federal law, protects employees against discrimination on the basis of their pregnancy. Employers may not exclude pregnant women from work based on unsupported concerns about the safety of the mother or the fetus.

Under the terms of the settlement, Comfort Inn agreed to pay the woman $2,500 in back pay and $25,000 in compensatory and punitive damages. The hotel also agreed to not discriminate against women on the basis of their pregnancy in the future and to not require pregnant employees to provide medical documents releasing them to work. And it agreed to provide training on fair employment practices and to post nondiscrimination notices.

If you have questions about your rights and responsibilities under fair employment laws, please contact the BHRC.

Employers May Test All Probationary Employees For Drugs and Alcohol

U.S. Steel has a practice of conducting random drug and alcohol testing on its probationary employees. Probationary employees who failed the tests sued, saying this practice was a violation of the Americans with Disabilities Act (ADA). They lost.

Employees of U.S. Steel face unique working conditions. They work on or very near the coke batteries, which contain molten coke and can reach 2,100 degrees Fahrenheit. Their working areas may be very narrow or quite elevated. They also work with massive moving machinery, superheated gasses that are both toxic and combustible and other dangers. They wear head-to-toe protective gear, making it harder for supervisors to see signs of impairment that an office supervisor might notice in an employee at her desk.

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces the ADA, said employers "must have objective evidence than an employee either cannot perform the essential functions of the job or poses a direct threat in order to subject the employee to a medical examination or inquiry" under the ADA. The Court did not agree. It said that U.S. Steel has an undeniable right to be concerned about safety issues, and that it was reasonable to test only probationary employees. Employees who have worked for the company long enough to be removed from probationary status "have proven that they can follow the appropriate safety standards and adequately perform their job on a daily basis. Not so with new employees."

The Court disagreed with U.S. Steel that the drug and alcohol testing was permitted under the ADA as a "voluntary medical exam." The Court said voluntary medical exams refer to truly voluntary wellness programs that an employer might provide such as blood pressure checks. U. S. Steel employees would be fired if they didn't agree to the drug and alcohol tests. But U.S. Steel won anyway, as they had the right to test all probationary employees on safety grounds.

The case is U.S. Equal Employment Opportunity Commission v. United States Steel Corporation, 2013 WL 625315 (W.D. Pa 2013).

Justice Department Reaches Settlement to Stop HIV Discrimination

The U.S. Department of Justice (DOJ) announced in February that it had reached a settlement with a dentist's office under the Americans with Disabilities Act (ADA).

According to the DOJ, Woodlawn Family Dentistry in Virginia required a patient with HIV to schedule all of his future appointments as the last appointment of the day. The DOJ said that the office failed to offer this patient the same options and schedule availability that it offered to other patients, and there was no lawful reason that Woodlawn needed to treat this patient only at the end of the day.

Under the terms of the settlement, Woodlawn must pay $7,000 to the patient and $3,000 in civil penalties. It also must train its staff on the ADA and develop and implement a non-discrimination policy.

This was the third ADA settlement relating to AIDS that the DOJ announced in two weeks. All three settlements are part of the DOJ's Barrier-Free Health Care Initiative.

For more information about the ADA and HIV, visit www.ada.gov/aids, or contact the BHRC.

Derby-Themed Fundraiser

PALS (People and Animal Learning Services, Inc.) invites you to its annual fundraiser, the PALS Mane Event. This year, the Mane Event will take place at 6 p.m. on May 31 in IU's Alumni Hall. The Derby-themed evening will begin with beer and wine tasting, live music and a silent auction. Dinner will follow, along with an auction hosted by auctioneer Jimmie Dean Coffey. Auction items include vacation packages, local artwork, Disney World passes and more.

All proceeds from the event support PALS riders, programs and horses. PALS is a non-profit organization that provides therapeutic equine activities for people with disabilities and at-risk youth. Since its founding in Bloomington in 2000, PALS has provided more than 17,600 lessons.

Tickets are $65 per person, and guests must be at least 21 years old with a valid id. Derby attire is encouraged. For more event information, visit www.palstherapy.org/maneevent, e-mail maneevent@palstherapy or call 812.336.2798, extension 4.

Beer and wine during the tasting portion of the evening will be provided by Bloomington Brewing Company, Cedar Creek Winery, Chateau Thomas Winery, Manolo Wines, Monarch Beverage Company, Oliver Winery, Power House Brewing Company and Upland Brewing. Oliver Winery and Bloomington Brewing Company will provide drink selections during dinner.

PALS would like to thank the event's sponsors, including Bloomington Ford, Cook Medical, Wash and Wag Mobile Pet Salon, Yellow Rose Ranch, Awards Center, BloomingtonOnline.net, MailPak Magazine, Trojan Horse, WBWB-B97, WFHB and WFIU.

Creating a New Job as a Reasonable Accommodation

John Wardia worked for the Department of Juvenile Justice in Kentucky as a youth worker from 2003 until 2009. In 2008, after he had neck surgery, he was no longer able to do one of the essential duties of his position, physically restraining juveniles when necessary. To accommodate his temporary medical restriction, he was given a light-duty assignment in the detention center's control room. Typically, youth workers work in the control room on a rotating basis.

He asked to be permanently assigned to the control room, where he would never have to physically restrain a juvenile. The center denied his request, and so he sued under the Americans with Disabilities Act (ADA). He lost.

The Court said that it was undisputed that Wardia could no longer do one of the essential functions of his job, physically restraining juveniles. Wardia himself said it was an essential part of the job and that he had been given extensive training on restraining practices. And he admitted that working in the control room was just one part of a youth worker's job and not a separate position. The Court said that Wardia's proposed accommodation would require the detention center to create a new position, which is not an obligation of an employer under the ADA. The case is Wardia v. Justice and Public Safety Cabinet Department of Juvenile Justice, 2012 WL 1004331 (E.D. KY 2012).